No. 3850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARTLAND LAW, EUGENE D. N. E. LEHE, MELVILLE W. LAWRENCE and H. O. COMSTOCK, copartners, doing business as LAWRENCE & COMSTOCK, NELLIE COPLAND and JOHN DOE COPLAND (her husband),

Plaintiffs in Error,

vs.

ARTHUR L. SMITH, dam gate-keeper, A. P. DAVIS, chief engineer and director, F. G. HOUGH, late project superintendent, JOHN F. TRUESDELL, special assistant to the attorney general of the United States Reclamation Service,

Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR ARTHUR L. SMITH

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STATEMENT OF THE CASE.

The facts in the case are that the defendant in error, Arthur L. Smith, acting in the employ of the United States Reclamation Service, so operated the gates of the Government's dam below the outlet of Lake Tahoe at the northern end of the lake that in the latter part of June, 1916, the waters stored

therein attained an elevation of 6229.8 feet above sea level. The lands of plaintiff in error Law lie on Emerald Bay, near the south end of the lake and several miles distant from the dam. At or about the time the waters reached this point the evidence shows that the witness Comstock sent word to "the man in charge of the gate at Tahoe City that the water was so high that it was doing damage. He replied that he was there under a salary and could not change the gates without further orders". (Transcript, page 31). Afterwards a storm arose, which washed out a wall at Comstock's place and did damage to other structures at or near the waters' edge, such as the cribbing around a hot spring located in the lake at Comstock's place. (Transcript, pages 31, 32). Plaintiff in error Law testified (Transcript, page 30) to injuries caused by wave action when the Tahoe steamer and other boats passed his place, as well as injuries to his boat house, wharves, and beach.

Do these facts constitute trespass upon real property or trespass on the case? That is the only question involved. If they constitute trespass upon real property the suit was not barred by the two year statute of limitations and the ruling of the trial court was erroneous. If they constitute trespass on the case the suit was barred and the court's ruling was correct.

The injuries were alleged to have occurred in June, 1916. The suit was commenced in June, 1919,

more than two years, but apparently less than three years thereafter. Defendant in error plead the statute of limitations in his answer (Transcript, page 9) and at the trial made objections to the introduction of evidence as to damages occurring more than two years prior to the commencement of the action. The trial court held that "the backing up of water upon the premises in the manner here shown is not in its nature a direct trespass, it is a trespass which is the subject matter of an action of trespass on the case. * * * The objection to the evidence here will be sustained." (Transcript, page 33.) Plaintiff in error then announced that, if such evidence was excluded he could not proceed with his case, but must submit to a nonsuit. (Transcript, page 34.) Upon motion of defendant in error a judgment of nonsuit was thereupon entered.

ARGUMENT.

Under these facts defendant in error submits that there was no error in the ruling of the District Court for the following reasons:

First: Because the District Court followed the California Supreme Court, which has in several instances interpreted the expression "an action for trespass upon real property" in the California Statute of Limitations as not including cases of this character.

Second: Because the great weight of authorities supports the California decisions.

Third: Because the Federal Courts in this State should follow the California Supreme Court's interpretation of the California Statute of Limitations.

California Authorities:

Under the California decisions the alleged injuries to the lands of plaintiff in error were not the immediate act of the defendant in error, but only the consequence thereof. This question has been passed upon several times by the Supreme Court of California, and so far as we have been able to ascertain all of its decisions on the subject, with one possible exception, are uniformly to the effect that trespass on the case is the proper remedy in such cases, and that such actions are barred after two years by the statute of limitations. (Subdivision 1, Section 339, of the Code of Civil Procedure.) The possible exception referred to is the case of Conniff v. San Francisco, 67 Cal. 45, so strongly relied upon by the plaintiff in error. Later California decisions, beginning with the case of Hicks v. Drew, 117 Cal. 305, which will hereafter be more fully considered, have both distinguished the Conniff case from the case at bar and have expressly limited the rule laid down in the Conniff case to the precise facts involved in that case, namely: *the permanent flooding of lands in such a manner as to constitute an actual taking thereof.* (Page 311 of the Hicks v. Drew case, as will be heheinafter noted in an excerpt from that case.)

Conniff v. San Francisco: Plaintiff in error in his brief appears to rely almost entirely upon the Conniff case and by seeking to distinguish that case on the facts from Hicks v. Drew and other later decisions of the California Supreme Court, he insists that these later cases "leave the rule of Conniff v. San Francisco untouched". He takes the position on page 9 of his brief that there is a legal distinction between a case in which a man does some act for the protection of his land and where he does some other lawful act on his own land which results in injury to another's land, in that the former is trespass on the case, while the latter is a direct trespass upon real property. He cites no authority for such a distinction and we have found none. We do not believe that any such distinction can properly be drawn, especially in the light of the authorities hereinafter mentioned, several of which are at least strongly inferential to the contrary, and one (Crockett v. Millett, 65 Me. 191), while not a California case, is on the facts almost identical with the case at bar and holds trespass on the case to be the proper remedy.

The Conniff case appears to have been the first of a number of California cases involving the interpretation of the same clause in the Statute of Limitations relied upon in this suit, namely: subdivision 2 of Section 338 of the Code of Civil Procedure. An examination of Shepard's Citations and the American Digest system indicates that the Conniff

case has never been followed on this point in any of the later decisions of the California Supreme Court or any other Court, nor has it ever been cited on this point except in the case of Hicks v. Drew, where it is practically overruled.

The case at bar does not involve the permanent flooding of lands, but on the contrary relates to a specific alleged "rise in the lake" during the latter part of June, 1916. There is no allegation in the complaint, nor any evidence in the record, nor do we believe that pliantiff in error would contend that this brief period of high water in the lake resulted in the permanent flooding of any of plaintiff in error's lands. But in Hicks v. Drew, 117 Cal. 305, the Court states that it is only upon such a state of facts, to-wit: the permanent flooding of lands in such manner as to amount to a taking, that the decision in the Conniff case can be supported. Attention is invited to the fact that Pumpelly v. Green Bay Co., 13 Wall. 166, upon which the decision in the Conniff case appears to have been based, was an action of trespass on the case and not trespass, which appears to strengthen the view that in the Conniff case the Court failed to distinguish between trespass and such consequential injuries as amount to a permanent injury or virtual taking under the constitutions of the various states which forbid the taking of private property for public use without just compensation. We believe that both logic and the overwhelming weight of the authorities

in California and elsewhere support the view that it is not the extent of the damage done that determines whether the remedy at common law was trespass or case, but the nature of the wrongful act which caused the damage. For example, by merely walking across a man's land, which is a direct trespass, the damage done is less harmful and less permanent in character than that accomplished in the numerous cases of damage by flowage herein cited which were held by the courts to have been trespass on the case.

Hicks v. Drew, the leading California Case: Hicks v. Drew, the most carefully considered of the several California decisions which support our contention that the acts of defendant in error constitute trespass on the case, deals with the exact question at issue so thoroughly that we take the liberty of quoting extensively from that case as follows:

> "By the instructions to the jury the Court limited a recovery against defendant to damages accruing within two years prior to the filing of the complaint. This instruction was given in view of Section 339 of the Code of Civil Procedure, subdivision 1, which provides that an action founded upon a contract, obligation, or liability not based upon a written instrument must be brought within two years. Appellant denies the application of this statute to the facts of her case, and declares that she had a right to bring the action at any time within three years from the accrual thereof, by virtue of Section 338 of the Code of Civil Procedure,

subdivision 2, which provides that an action for trespass upon real property may be brought within three years after it has accrued. Is the present action one to recover damages for a trespass upon real property? While in this state all distinctions between common law actions are abolished as relating to the procedure, yet it is plain that we are bound to consult the common law, and the classification of common law actions, for the proper determination as to what the law-making pover of this state had in mind when using the phase, 'trespass on real property'.

"It appears that the Courts of England often experienced difficulty in determining whether trespass or case was the true remedy to be pursued. This same difficulty often arises in this state, when the statute of limitations is invoked. But in the case at bar, weighed and tested by the rules of the common law, the distinction between these two forms of common law actions is clearly apparent; and that this case upon its facts is one wherein it is sought to recover upon a liability not based upon an instrument of writing, and, therefore, barred in two years, we are satisfied.

"One of the best tests by which to distinguish trespass is found in the answer to the question, when was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential, and no trespass. Chitty says: 'If a log, in the act of being thrown into the highway, hit another, the injury is immediate;

but if, after it has reached the highway, a person fall over it and be hurt, the injury is only consequential, and the remedy should be case. * * * So, if a person pour water on my land, the injury is immediate, but if he stop up a watercourse on his own land, whereby it is prevented from flowing to mine as usual, or if he place a spout on his own building, in consequence of which water afterward runs therefrom into my land, the injury is consequential; because the flowing of the water, which was the immediate injury, was not the wrongdoer's immediate act, but only the consequence thereof, and which will not render the act itself a trespass or immediate wrong." (Critty on Pleading, 142.) Gould on Water, Section 210, declares: *'It is not a trespass to flow the land of another with water by erecting a dam below his land, for any one may lawfully build a dam on his own land, and the act, being injurious only in its consequences, is to be redressed by an action on the case'.* Angell on Watercourses, at section 395, in speaking as to the remedy of action on the case, says: 'This remedy is the judicial one now always resorted to in the usual case of consequential injury to or by means of a watercourse. The general result of the English authorities renders it very clear that where damages do not immediately ensue from the act complained of, it is consequential, and case is the proper remedy; and, on the contrary, where the act itself, and not the consequences of it, occasions the mischief, trespass is the right action.' In Perrine v. Bergin, 14 N. J. L. 355, 27 Am. Dec. 63, where the lands of an upper

owner upon the stream were overflowed by a dam of the lower owner, it is said: '*So far from being ouster, it is not even a trespass, to flow the land of another with water by erecting a dam below his land, for the act itself is lawful. Any man may build a dam by common right on his own land, and trespass never lies when the act is lawful in itself, and injurious only in its consequences.* * * * It is therefore no dispossession, no ouster, nor even a trespass, to flow water backward on another person's land. It is denominated in law a nuisance and annoyance to the tenant in possession; and his only modern remedy is by an action on the case, founded on his possession.'

"To support plaintiff's contention that defendant's acts, in law, constituted a trespass upon plaintiff's realty, certain decisions of this Court are relied upon; but those decisions fail to accomplish the result, and are not opposed to the views of the common law writers from which we have quoted. In Triscony v. Brandenstein, 66 Cal. 514, this Court held that a cause of action for trespass upon realty was stated in a complaint which charged that defendant 'wrongfully and unlawfully entered upon plaintiff's lands and * * * depastured the same with five hundred head of cattle and ten head of horses, to plaintiff's damage'. Clearly, here was an unlawful entry and damage done to the realty. The cattle and horses were but the means by which the damage was done. Any other means used to do the damage, by the party who made the entry, would have been equally sufficient in making out a cause of

action. In that case there was an actual unlawful entry, accompanied by damage. The act of entry was unlawful, and the damage done was in no sense consequential. The entry and damage were inseparably connected. Zumwalt v. Dickey, 92 Cal. 156, is in all respects a similar case. Conniff v. San Francisco, 67 Cal. 45, in principle is more like the case at bar. At the same time there is a material and substantial difference. In addition it may be suggested that the principles laid down by Conniff case find support in Pumpelly v. Green Bay etc. Company, 13 Wall., 166; and it was largely upon the authority of that case that the decision in Conniff v. San Francisco, supra, was based. Yet the same high court that decided Pumpelly v. Green Bay etc. Co., supra, in a recent decision said that declared 'the extremest limitation of the doctrine to be found'. (Transportation Co. v. Chicago, 99 U. S. 642.) In considering the Pumpelly case, and Eaton v. Boston etc. R. R. Co., 51 N. H. 504, 12 Am. Rep. 147, the Supreme Court of the United States said: 'In these actions it was held that permanent flooding of private property may be regarded as a 'taking'. In these cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession'. *In the Conniff case the facts were declared by this Court to be the same as we have just quoted, and it is only upon such a state of facts that the decision may be supported.* The facts of the case at bar do not bring it within the doctrine of Conniff v. San Francisco, supra. If the dam or bulkhead erected by defendant upon his land had

> resulted in the prevention of water flowing upon plaintiff's land, which had been accustomed to so flow, and damage to plaintiff's freehold had been the result, it could hardly be contended that such acts amounted to a trespass upon real estate. Yet, upon principle, the action for redress would be the same as in the case at bar."
>
> Hicks v. Drew, 117 Cal. 305.
>
> (The italics are ours.)

Later California Cases follow Hicks v. Drew: In the case of Crim v. San Francisco, 152 Cal. 279, the City and County of San Francisco maintained a sewer over and across a certain tract of land belonging to the City, called the Almshouse Tract, but did not connect the sewer with any main sewer having a proper outlet until a short time before the commencement of the action. The discharge from said sewer washed out a gully or bed for itself through the property of the plaintiff and carried away large quantities of soil therefrom. The Court said in part:

> "It is clear, however, that the wrongful acts alleged against defendant in the case at bar do not constitute trespass upon real property. That was definitely settled by this court in Hicks v. Drew, 117 Cal. 305 (49 Pac. 189), which raised the same question as is presented here, and in which the court said: 'If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential and no trespass'. For

> the wrongful acts alleged in the case at bar the remedy at common law would have been 'an action on the case', and although the old forms of actions are abolished, the facts which constitute 'trespass on real property' still govern."
>
> Crim v. City & County of San Francisco, 152 Cal. 279.

In the case of Daneri v. Southern California Railway Co., 122 Cal. 507, where a levee constructed by the railway company deflected the waters of a river and caused them to form a new channel cut through the lands of plaintiff, the Court held that this was an action of trespass on the case and was barred after two years from the time the cause of action arose. The Court cited Hicks v. Drew and other authorities in support of its decision.

The following quotation is taken from the still more recent case of Porter v. Los Angeles, 182 Cal. 515, decided in 1920, which appears to be the last word of the California Supreme Court on this particular question:

> "It is the settled law in this state that the three years' period of limitation for an action for trespass upon real property applies only where there is some entry upon the premises of plaintiff or direct or intentional injury thereto, amounting to a trespass thereon, and does not apply to actions in which the injury caused to the plaintiff's real property is consequential only and arises from some lawful act of defendant not done upon the plaintiff's property, but committed elsewhere, and causing as

a consequence thereof some injury to plaintiff's property not arising from an entry thereon by defendant or his agencies. (Hicks v. Drew, 117 Cal. 305; Daneri v. Southern C. R. Co., 122 Cal. 507; Crim v. San Francisco, 152 Cal. 279.) The decisions in other states having a similar Statute of Limitations are to the same effect. (Welch v. Seattle etc. Co., 56 Wash. 97; Denney v. Everett, 46 Wash. 342; Rountree v. Brantley, 34 Ala. 554; Eagle County v. Gibson, 62 Ala. 369; Platt etc. Co. v. Waterbury, 80 Conn. 184.)"

Porter v. Los, Angeles, 182 Cal. 515.

It is interesting to note that each of these three California cases, while passing upon the exact point upon which plaintiff in error claims the Conniff case is decisive, omits any mention of the Conniff case, apparently on the theory that this case was overruled by Hicks v. Drew.

Overwhelming Weight of Authority Supports California Decision in Hicks v. Drew:

The authorities of the various common law jurisdictions are fully in accord with the rule laid down in Hicks v. Drew. Even those authorities relied upon by plaintiff in error, with the exception of the Conniff case hereinbefore discussed, are not out of harmony with Hicks v. Drew, as will be noted from the following. This statement does not take into consideration the obiter dictum of Justice Olney, quoted on pages 16 and 17 of plaintiff in error's brief, which is in the nature of a dissent from the

decision of the other six justices who cited the Hicks case with approval.

Discussion of Authorities of Plaintiff in Error: In addition to the Conniff case and Justice Olney's protest, plaintiff in error has cited only the following seven authorities in his brief:

1 Chitty on Pleadings, p. 196 (p. 6 of his brief).

Pumpelly v. Green Bay Co., 13 Wall 166 (p. 7 of his brief).

Kelly v. Lett, 35 N. C. 50, 3 Blackstone's Comm. 123, Gale (Gates) v. Miles, 3 Conn. 70 (p. 8 of his brief).

6 Cyc., 684.

1 Bouv. Law Dict., p. 288 (p. 10 of his brief).

As we feel that these authorities do not support plaintiff in error's contention we will discuss them in the order in which they were cited.

(1) We assume that there was some inadvertent inaccuracy in his reference to 1 Chitty, p. 196, as we find nothing on the page referred to which seems in point on either side of this question, although 1 Chitty, p. 142, as quoted and approved in the Hicks case (see p. 9 of this brief) is deemed to be clearly opposed to the theory of plaintiff in error.

(2) The case of Pumpelly v. Green Bay Co. was an action of trespass on the case and therefore can hardly be said to support his contention that the facts constitute trespass rather than case.

(3) In Kelly v. Lett, 35 N. C. 50, a case cited by plaintiff in error, the defendant owned a mill dam above the mill dam of plaintiff on the same stream and purposely and maliciously accumulated the waters above his mill dam for the express purpose of discharging them against the mill dam of the plaintiff to destroy it. The Court said:

> "When the act itself is complained of, trespass *vi et armis* is the proper action. When the consequences only are complained of, then case is the proper action. * * * Suppose the defendant had planted a cannon on his dam and wilfully fired at the plaintiff's dam until it was demolished; it could not be distinguished from the present case—the only difference being in the kind of force. In the one the dam is destroyed by metal propelled by the force of gunpowder; in the other it is destroyed by water, propelled by the force of gravitation—the water being kept back on purpose to increase the head and thereby add to the power of the propelling force. Both are neither more nor less than willful trespass."

Surely this case lends no support to the theory urged by plaintiff in error. This was not a case of injury from backwater from a dam, but, on the contrary, the dam was being used in this case for an unlawful purpose. It was operated expressly and solely with a view to the direct discharge of water upon plaintiff's dam below. This distinction

is made clear in the later case of Shaw v. Etheridge, 52 N. C. 225, in which the same Court held that where defendant obstructed a drainage ditch by throwing in clay and other material at a point on his own land just below the boundary line between his land and that of the plaintiff, with the result that a considerable portion of plaintiff's land was inundated and his crops damaged, case was the appropriate remedy since the injury was consequential and not direct. Here the Court said:

> "The case is manifestly distinguishable from that of Kelly v. Lett, 35 N. C. 50, in which it was alleged that the plaintiff was the owner of a mill a short distance below the one occupied by defendant on the same stream and that the defendant *willfully, and with the intent to injure the plaintiff,* frequently shut down his gates so as to accumulate a large head of water and then raised them, by which means an immense volume of water was thrown with great force against the plaintiff's dam and swept it away." (Italics in original text.)
>
> See also Hogwood v. Edwards, 61 N. C. 350, to the same effect.

(4) As to plaintiff in error's next authority we deem the following quotation a sufficient commentary:

> "And it is a settled distinction that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis;* but where there is no act done but

only a culpable omission or where the act is not immediately injurious, but only by *consequence* and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case for the damage consequent on such omission or act." (Italics in original text.)

3 Blackstone Comm. 123.

(5) Taking next Gates v. Miles (not Gale v. Miles), 3 Conn. 70, cited by plaintiff in error, we find that that was a case in which the defendant was in personal direction of a ship owned by him and the helmsman in obedience to his express order "turned the sloop and in pursuance of the direction thus given she directly struck the Mary", the Mary being another ship owned by the plaintiff. Here the court very properly held that it was tresspass. We submit that the facts and decision in this case do not tend to support plaintiff in error's contention.

(6) As for plaintiff in error's sixth authority we quote:

"For a tort committed with force and intentionally, the immediate consequence of which is injury, trespass is the appropriate remedy. If the injury proceeds from mere negligence or is not the immediate consequence of tort, case is the appropriate remedy. The injury is considered immediate when the act complained of itself and not merely a consequence of that act occasions the injury."

6 Cyc. 684.

(7) On the page cited by plaintiff in error Bouvier says that the action of case lies for:

> "Torts committed forcibly when the injury is consequential merely, and not immediate; (citing authorities) as special damage from a public nuisance; (citing authorities) acts done on the defendant's land which by immediate consequence injure the plaintiff" (citing authorities).

1 Bouv. Law Dict., p. 288.

Some Other Authorities in Point: We have made what we believe to be a fairly thorough examination of the authorities in this matter and we feel that the overwhelming weight of the decisions, as well as the almost unanimous conclusion of text and encyclopedia writers, supports the view expressed in 11 Corpus Juris 9, to the effect that

> "Case is the appropriate remedy for the recovery of damages occasioned by the construction of a dam or other obstruction in the stream and resulting in the flooding of plaintiff's land".

11 Corpus Juris 9;

1 Corpus Juris 1001;

4 Sutherland Code Pleading and Practice, Art 6533;

Crockett v. Millett, 65 Me. 191, 195;

Keller v. Stoltz, 71 Pa. St. 356;

Fifield v. Bailey, 55 N. H. 380;

1 Bouv. Law Dict., p. 288;

Wabash v. Spear, 16 Ind. 441, 79 Am. De. 444, 26 R. C. L. 988, 989.

The case of Crockett v. Millett, 65 Me. 191, cited above, is so nearly like the case at bar on the facts that we feel it deserves particular consideration. In this case the defendants owned the land upon which their dam was built, but owned no mill. They erected and maintained the dam as a reservoir dam for the benefit of mill owners below, but had no interest in the mill for the use of which the water was retained, nor in the land upon which the mill was erected. The plaintiffs owned certain lands above the dam which were overflowed. The suit was an *action on the case* to recover damages caused by the backwater. The Court said:

> "The plaintiff has been injured by the defendants' dam and is entitled to compensation therefor. The question presented for determination is whether this action is maintainable or whether the process should not have been a complaint under R. S. C. 92, Art. 1. * * * It is apparent that in accordance with the decision of this Court a complaint under the flowage act can not be maintained (because defendant was not the owner of a mill), but there is a remedy for the injury sustained and that is by an action on the case, which was the common law remedy before any legislation on the subject."
>
> Crockett v. Millett, 65 Me. 191, 195.
> (The parenthetical clause was inserted by us.)

Federal Courts Bound by State Courts' Construction of Statute of Limitations:

Federal Courts will follow the construction which the Supreme Court of a state places upon its own

Statute of Limitations. In Bauserman v. Blount, Mr. Justice Gray of the United States Supreme Court cites eighteen decisions of that Court in support of his statement that

> "No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitation of actions, real and personal, as enacted by the legislature of a state and as construed by its highest court."
>
> Bauserman v. Blount, 147 U. S. 647, 13 Sup. Ct. 466, 468, 37 L. Ed. 316.

In the case of Great Western Telegraph Co. v. Purdy, the same Judge cites four United States Supreme Court decisions as authority for the proposition that

> "The limitation of actions is governed by the *lex Fori,* and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act, or the judicial construction, differs from that prevailing in other jurisdictions. McElmoyle v. Cohen, 38 U. S. 13 Pet. 312; Bauserman v. Blount, 147 U. S. 647; Metcalf v. Watertown, 153 U. S. 671; Balkam v. Woolstock, 154 U. S. 177."
>
> Western Telegraph Co. v. Purdy, 162 U. S. 329; 40 L. Ed. 986.

In Quinette v. Pullman, 229 Fed. 333, at p. 337 thereof, the Circuit Court of Appeals of the Eighth

Circuit, in an opinion handed down in 1916, after a comprehensive review of the authorities above cited and more modern ones, states that "No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule".

In conclusion we submit that the foregoing authorities establish the three propositions outlined at the beginning of this brief, to-wit: that the ruling of the District Court followed the decisions of the Supreme Court of California; that it is in accord with the great weight of authority; that it was bound to follow such California decisions even though they were opposed to the weight of authority. The ruling of the District Court should accordingly be affirmed.

Respectfully submitted,
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